Supreme Court, U. S.
FILED
DEC 16 1977
MICHAEL RODAK, JR., CLERK

No. 77-508

In the Supreme Court of the United States

OCTOBER TERM, 1977

GTE SYLVANIA, INCORPORATED, ET AL., PETITIONERS

v.

CONSUMERS UNION OF THE UNITED STATES, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-16a) is reported at 561 F. 2d 349; the opinion and order of the court of appeals denying rehearing (Pet. App. 71a-74a) are not yet reported. The opinion of the district court (Pet. App. 75a-86a) is reported at 400 F. Supp. 848.

JURISDICTION

The judgment of the court of appeals was entered on July 5, 1977, and petitions for rehearing were denied on August 25, 1977. The petition for a writ of certiorari was filed on October 3, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals erred in directing the district court to adjudicate this case, which was brought by respondent Consumers Union to obtain disclosure, requested under the Freedom of Information Act, of certain documents within the custody of the Consumer Product Safety Commission, notwithstanding the facts that petitioners earlier had filed an action in the United States District Court for the District of Delaware seeking to enjoin the Commission from disclosing the documents and that that court had issued a preliminary injunction prohibiting disclosure pending disposition of that case.

STATEMENT

In June 1974, Consumers Union and other parties (hereinafter "the requesters") submitted to the Consumer Product Safety Commission a request under the Freedom of Information Act, 5 U.S.C. (and Supp. V) 552, for disclosure of certain documents concerning television accidents that petitioners (hereinafter "the manufacturers") had furnished to the Commission under claims of confidentiality (Pet. App. 3a-4a). In March 1975 the Commission concluded that the documents were not exempt from disclosure under the Act and that, even if they were not subject to mandatory disclosure, the Commission would exercise its discretion in favor of disclosing them (Pet. App. 5a).

After receiving notice of the Commission's decision, in April 1975 the manufacturers filed suits in the United States District Court in the District of Delaware, and in certain other federal district courts, seeking to enjoin disclosure (Pet. App. 5a-6a). Subsequently, all of the manufacturers' suits were consolidated in the District of Delaware. The court issued a preliminary injunction in October 1975 prohibiting disclosure of the documents pending a decision on the merits (Pet. App. 87a-126a).

The requesters did not seek to intervene in the Delaware proceeding. Instead, in May 1975 they filed this action against the Commission and the manufacturers in the United States District Court for the District of Columbia, seeking disclosure of the documents. The Commission and the manufacturers moved to dismiss on the ground that there was no case or controversy between the requesters and the Commission; in the alternative, the Commission and the manufacturers moved to stay further proceedings pending decision in the Delaware case (Pet. App. 75a-76a).

In September 1975, the court in the District of Columbia dismissed that action on the ground that, in view of the fact that both the requesters and the Commission favored disclosure of the documents, there was no case or controversy and the court therefore lacked jurisdiction (Pet. App. 75a-85a).

The court of appeals reversed (Pet. App. 1a-16a). The court first held that there was a case or controversy between the requesters and the Commission with respect to whether the Delaware proceeding prevented the District of Columbia court from adjudicating the case and ordering disclosure, and that that controversy sufficed to give the court jurisdiction (Pet. App. 9a-10a). Second, the court of appeals held that the Delaware proceeding did not prevent the District of Columbia district court from proceeding to the merits because the court of appeals believed that the Delaware proceeding had terminated, and also because the court doubted the vigor and sincerity with which the Commission opposed the manufacturers' suit in Delaware (Pet. App. 13a-15a). The court therefore remanded to the district court with instructions to adjudicate the merits of the requesters' suit (Pet. App. 15a-16a).

The Commission and the manufacturers petitioned for rehearing on the ground that the court misunderstood the status of the Delaware proceeding. They pointed out that the proceeding had not been terminated but had only been postponed pending a decision on one of the legal issues in a case in another district. During that postponement the Delaware court had removed the case from its "open docket" but had made clear that that action was not a disposition of the matter. They also pointed out that the Delaware proceeding was in fact scheduled for trial on the merits on September 12, 1977 (Pet. App. 17a-66a). On August 25, 1977, the court of appeals denied the petitions for rehearing on the ground that "[s]ince all necessary parties are before the District Court here, there appears no reason why the litigation should not proceed here, particularly since this is the venue authorized by the FOIA" (Pet. App. 72a).

After the court of appeals' original decision but before its denial of the petitions for rehearing, the Commission asked the Delaware district court to transfer that proceeding to the District of Columbia district court. On September 15, 1977, the Delaware court denied that motion (Pet. App. 128a-137a) on the ground, *inter alia*, that the Delaware proceeding had generated a voluminous record and was substantially advanced, while "nothing towards the disposition of the merits has been accomplished in the D. C. litigation" (Pet. App. 132a).

On December 8, 1977, the Delaware district court entered a final decision on the merits permanently enjoining the Commission from disclosing the documents.[1]

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[1]We are lodging copies of the judgment and the opinion entered by the court with the Clerk of this Court.

ARGUMENT

Review of the decision below is unwarranted at this time.

1. Although we argued to the contrary in the courts below, further reflection has persuaded us that a case or controversy, within the meaning of Article III, exists between the requesters and the Commission. The requesters seek "a declaration that the requested documents * * * must be made immediately available * * * for inspection and/or copying; and * * * an injunction enjoining the [Commission] and its agents and employees from failing to make the requested documents immediately available" (Pet. App. 75a). The Commission throughout has taken the position that such relief cannot be granted so long as the preliminary (and now permanent) injunction issued by the Delaware court bars disclosure. In other words, the requesters and the Commission do not agree as to the appropriate disposition of this action in the district court and accordingly do not "desire precisely the same result." *Moore* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 47, 48. Because of this, there was no constitutional impediment to jurisdiction in the district court.

We question, however, whether the district court below is empowered to order disclosure so long as the Delaware injunction remains in force. Under the Act, the district court "has jurisdiction * * * to order the production of any agency records [that are being] improperly withheld." 5 U.S.C. (Supp. V) 552(a)(4)(B). An agency's withholding of documents pursuant to court order is not improper. Thus there appears to have been a sufficient statutory basis for the district court's dismissal of the requesters' complaint. That issue was not fully presented to or decided by the court of appeals, however, and it therefore does not warrant review by this Court.

2. We agree with petitioners that the court of appeals erred in directing the district court to proceed expeditiously to adjudicate the merits notwithstanding the pendency of the proceeding in Delaware and the outstanding preliminary injunction issued by the Delaware court. It is well established that a federal district court, in the interests of comity and judicial economy, should refrain from duplicating or interfering with the proceedings and orders of another federal district court with prior jurisdiction over the subject matter. See *Colorado River Water Conservation District* v. *United States*, 424 U.S. 800, 817; *Kerotest Mfg. Co.* v. *C-O-Two Fire Equipment Co.*, 342 U.S. 180, 183; *Hilton Hotels Corp.* v. *Weaver*, 325 F. 2d 1010 (C.A.D.C.), certiorari denied, 376 U.S. 951. Adjudication of the requesters' suit by the district court below would duplicate the efforts of the district court in Delaware. Moreover, a final judgment by the District of Columbia court may conflict with the final judgment and permanent injunction recently entered by the Delaware court and thus may subject the Commission to conflicting orders. There appears no reason in this case to depart from the general rule of comity,[2] and we submit the court of appeals erred in doing so.

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[2]While there are factors favoring the District of Columbia as the appropriate forum for this controversy (in particular, the presence of the requesters as parties), there are also factors strongly favoring Delaware, which the Delaware court found controlling when it denied the Commission's motion to transfer, including prior jurisdiction in that court and the advanced stage of the litigation there. Now that the court has entered a final judgment and permanent injunction, principles of comity should in our view preclude the District of Columbia court from proceeding with this litigation.

There is no basis for the court of appeals' suggestion that the Commission has not vigorously or sincerely espoused its position in the Delaware proceeding. At the outset of that litigation the

3. At present, however, it is not apparent whether any substantial duplication of effort or conflict will in fact occur. First, we believe that the district court in the District of Columbia now has the power to suspend its proceeding in view of the final disposition of the action in Delaware. Although the opinion of the court of appeals denying rehearing appears to direct the district court to proceed expeditiously with the litigation (Pet. App. 72a-73a), the subsequent final decision by the Delaware court constitutes a change in circumstances that would permit, if not require, the District of Columbia court to stay its hand. That decision, however, is one for the district court in the first instance. Accordingly, since there is no assurance that the decision below will subject the Commission to conflicting orders or result in an unwarranted duplication of judicial effort, review of the matter by this Court at this time is unwarranted. Should the Commission find itself actually subject to inconsistent judgments or decrees and not be able to obtain relief from appellate courts, then at that time review by this Court may become appropriate.

Commission consented to the issuance of temporary restraining orders, but it vigorously opposed the preliminary injunction sought by the manufacturers and has continued to oppose the manufacturers' claim on the merits.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.,
Solicitor General.

DECEMBER 1977.